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No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC., *Appellant,*

and

STATE OF MINNESOTA, *Appellant/Intervenor,*

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Appellee.*

On Appeal From the United States Court of Appeals for the Eighth Circuit

MOTION TO AFFIRM

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QUESTIONS PRESENTED

The questions presented are:

1. Whether 49 U.S.C. §10905 preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line.

2. Whether Hayfield Northern Railroad Company, Inc.'s attempt to condemn the subject track and right of way constitutes an impermissible collateral attack on the Interstate Commerce Commission's determination of value of the track and right of way.

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OPINIONS BELOW

The order of the Court of Appeals affirming the order of the District Court is reported at 693 F.2d 819, and appears as Appendix A to Appellants' Jurisdictional Statement (J.S. App. A-1 to A-11). The order of the District Court is not reported, and appears as Appendix C to Appellants' Jurisdictional Statement (J.S. App. A-13 to A-16).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution provides:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1941-1942 (codified at 49 U.S.C. §§10901, 10903 to 10905 (Supp. IV 1980)), are reproduced in the Appendix to Appellants' Jurisdictional Statement. 49 U.S.C. §10903 (Supp. IV 1980) appears therein as Appendix G (J.S. App. A-25 to A-26), and 49 U.S.C. §10905 (Supp. IV 1980) appears therein as Appendix F (J.S. App. A-20 to A-24).

Minn. Stat. §222.27 (1982) and Minn. Stat. §300.04 (1982) are set forth in Appellants' Jurisdictional Statement (J.S. 2 and 3, respectively).

STATEMENT

1. This is an appeal, pursuant to 28 U.S.C. §1254(2), from a decision of the United States Court of Appeals for the Eighth Circuit affirming the order of the United States District Court for the District of Minnesota which dismissed an adversary proceeding instituted by Hayfield Northern Railroad Company, Inc. (hereinafter "Hayfield Northern") against Chicago and North Western Transportation Company (hereinafter "C&NW") on the ground that 49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line.

2. On January 30, 1981, C&NW filed an application with the Interstate Commerce Commission (hereinafter "Commission"), pursuant to 49 U.S.C. §10903 (Supp. IV 1980) of the Interstate Commerce Act, for a certificate of abandonment of its railroad line between Oelwein, Iowa and Randolph, Minnesota.[1] Several shippers from southern Minnesota (hereinafter the "Shippers Group") opposed the abandonment of a 19.2-mile segment of the line between Dodge Center and Sargeant, Minnesota, and between Hayfield and Waltham, Minnesota.

The Administrative Law Judge (hereinafter "ALJ") found that the public convenience and necessity permitted abandonment of the entire line.[2] Contemporaneous with the

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[1]See Chicago and North Western Transp. Co.—Abandonment Between Oelwein, Ia. and Randolph, Mn., Docket No. AB-1 (Sub-No. 113F) (1981), *petition for review dismissed sub nom.* Brownsdale Cooperative Ass'n., *et al* v. Interstate Commerce Commission and United States, No. 81-2333 (8th Cir. Jan. 14, 1982).

[2]*Id.* The ALJ's decision was decided July 10, 1981 and served July 15, 1981.

ALJ's decision, which was administratively final, the findings were published in the Federal Register[2] on July 15, 1981, which among other things, required that if continued rail service was contemplated by any person, certain procedures must be undertaken in accordance with 49 C.F.R. §1121.38 (1981).

Thereafter, the Shippers Group, pursuant to 49 U.S.C. §10905, filed an offer of financial assistance[4] to subsidize operation of the 19.2-mile segment of the line. The Commission found the Shippers Group to be financially responsible persons within the meaning of 49 U.S.C. §10905 (App. C, A-19 to A-20). When the parties could not agree on subsidy terms, the Commission found the net liquidation value of the segment of the line to be $1,791,354.[5] Shortly thereafter, the Shippers Group filed an administrative appeal of the ALJ's decision authorizing abandonment, which appeal was denied by the Commission.

Shortly after the Commission announced its findings on net liquidation value and subsidy, the Shippers Group withdrew its offer of financial assistance on the 19.2-mile segment of the line (App. E, A-33 to A-34), and filed an appeal in the United States Court of Appeals for the Eighth Circuit seeking a reversal of the ALJ's decision authorizing abandonment.[6]

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[2]46 Fed. Reg. 36,763 (No. 135) (1981) (App. A, A-1 to A-3).

[4]The Shippers Group's offer of financial assistance (App. B, A-4 to A-17) was made pursuant to 49 C.F.R. §1121.38 (1981).

[5]App. D, A-25 to A-26, A-32. It was necessary to determine net liquidation value before the subsidy amount could be calculated. The subsidy should equal "the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line . . ." 49 U.S.C. §10905(d)(2)(A). One element of the "value of the line" is the net liquidation value of the rail properties on the line. 49 C.F.R. §1121.44(c) (1981).

In early January, 1982, after unsuccessfully seeking a stay of the order authorizing abandonment, the Shippers Group withdrew its appeal in the Court of Appeals of the substantive decision authorizing abandonment.[7]

In reliance on the finality of the administrative proceedings and the absence of any offers to purchase or subsidize the 19.2-mile segment of line for continued rail operation, C&NW entered into various contracts with the State of Iowa and certain Iowa shippers involving substantial upgrading of trackage in Iowa. C&NW planned to salvage and utilize the rail from the 19.2-mile segment of the line for this purpose.

On March 31, 1982, approximately three months after the substantive appeal was dismissed, and approximately six months after the Commission's determination of net liquidation value and subsidy cost, members of the Shippers Group formed the Hayfield Northern Railroad Company, Inc., which, under Minnesota law,[8] possessed condemnation powers to acquire property for railroad purposes. On the same day, Hayfield Northern filed suit in the Dodge County (Minnesota) District Court, alleging that it desired to condemn the track, appurtenances and right of way on the 19.2-mile segment of line and seeking a temporary restraining order preventing C&NW's removal of rail, ties and facilities from the segment of line. The state court granted the restraining order.

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[6]See Brownsdale Cooperative Association, *et al* v. Interstate Commerce Commission and United States, No. 81-2333 (8th Cir. filed Dec. 7, 1981). The Shippers Group did not appeal the Commission's determination of net liquidation value or subsidy amount.

[7]*Id.* Judgment of dismissal was entered January 14, 1982.

[8]Minn. Stat. §222.27 (1982); Minn. Stat. §300.04 (1982).

C&NW removed the suit to the United States District Court for the District of Minnesota,[9] and the State of Minnesota intervened to defend the constitutionality of its condemnation statute as applied. The District Court[10] entered summary judgment in favor of C&NW, dissolved the temporary restraining order, and dismissed Hayfield Northern's complaint with prejudice, holding that, on the facts presented, 49 U.S.C. §10905 preempts state condemnation procedures (J.S. App. C, A-13 to A-16).

Hayfield Northern appealed the District Court's order[11] and moved for a stay pending appeal and for an expedited appeal. After argument, the Court of Appeals granted Hayfield Northern's motions upon the posting of a $100,000 bond.

On December 3, 1982, the Court of Appeals affirmed the judgment of the District Court (J.S. App. A, A-1 to A-11), concluding that "49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line." *Hayfield Northern R.R. Co., Inc. v. Chicago and North Western Transp. Co.*, 693 F.2d 819, 820 (8th Cir. 1982) (J.S. App. A, A-1 to A-2).

Appellants' joint petitions for rehearing and rehearing en banc were denied by the Court of Appeals on January 18, 1983 (J.S. App. D, A-16 to A-17). On February 9, 1983, the Court of Appeals denied Appellants' joint peti-

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[9]Jurisdiction was based on diversity of citizenship.

[10]The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

[11]The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked pursuant to 28 U.S.C. §1291.

tion to stay the issuance of mandate pending appellate proceedings to this Court (J.S. App. H, A-26). On February 10, 1983, Appellants' joint application for stay of the Court of Appeals' mandate was denied by Circuit Justice Harry A. Blackmun of this Court (J.S. App. I, A-27). On February 22, 1983, Mr. Justice Rehnquist denied Appellants' renewed application for a stay of the Court of Appeals' mandate (J.S. App. J, A-28), after receiving the amicus curiae memorandum of the Solicitor General setting forth the view of the United States (J.S. App. L, A-30 to A-31). On March 7, 1983, this Court denied Appellants' renewed application for a stay of the Court of Appeals' mandate (J.S. App. K, A-29).

ARGUMENT

1. Pursuant to Rule 16 of the Rules of this Court, Appellee C&NW moves to affirm the judgment below on the ground that the Court of Appeals' decision is so eminently correct as to warrant summary affirmance by this Court.

2. In *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court conclusively established that the Commission's authority over railroad abandonments is exclusive and plenary. A review of recent statutory changes to the Interstate Commerce Act evinces Congress' intent that the Commission also have exclusive and plenary authority over rail service continuation following the administrative authorization of abandonment.

Since the passage of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31 (hereinafter "4-R Act"), the abandonment of a rail line does not merely involve the question of granting

or denying abandonment authority by the Commission, but also involves the question of disposition of the rail line following the administrative determination. In 1976, Congress was acutely aware of the inability of railroads to extricate themselves from the burden of operating unprofitable rail lines. Congress concluded that the railroad industry should not be forced to continue internalizing all losses from branch line operations and thereby further jeopardize the industry's already precarious economic health. *Chicago and North Western Transp. Co. v. United States*, 582 F.2d 1043, 1046 (7th Cir. 1978).

Under the 4-R Act, after a finding that public convenience and necessity permitted abandonment, the Commission was required to issue a certificate of abandonment unless a financially responsible person made an offer of rail service continuation assistance that would eliminate avoidable costs plus provide a reasonable return to the railroad. The parties were required to negotiate for a period not to exceed six months, and if no continuation subsidy or purchase was successfully negotiated, the Commission was required to issue a certificate of abandonment.

Unlike the provisions of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (hereinafter "3-R Act"), applicable only to the northeastern United States, the 4-R Act had no "cram down" provision that required rail service continuation either by compulsory sale or subsidy. The 4-R Act required compulsory negotiations once a rail service continuation offer was made, but did not provide for compulsory sale or subsidy. The 3-R Act and 4-R Act abandonment provisions were the first means by which Congress dealt with the question of rail service continuation following an administrative authorization of abandonment.

During the four-year interval following the passage of the 4-R Act, the financial health of the railroad industry continued to decline. Congress found, *inter alia*, that rail industry earnings were inadequate and that there would be a $16 to $20 billion capital shortfall in the rail industry by 1985. H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 3, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4111. Congress observed the deteriorating conditions of America's branch lines and found an ever increasing need for the rehabilitation and restructuring of the rail industry. *Id.*

By enacting the rail service continuation provisions of section 10905 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (hereinafter "Staggers Rail Act"), Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 125, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4110, 4157.

The Court of Appeals correctly recognized that the Staggers Rail Act was in part a Congressional response to protracted administrative and legal proceedings which delayed carrier abandonments and delayed the carrier's reuse of assets from abandonment lines.[12] Under section

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[12]The Commission has explicitly recognized that burdens on interstate commerce arise not only from losses sustained from operating unprofitable lines but also from the dedication of assets to operating the lines which could be used profitably elsewhere.

In Ex Parte 274 (Sub-No. 3)—Abandonment of R.R. Lines, Use of Opportunity Costs, 360 I.C.C. 571, 577 (1979), the Commission in a rulemaking proceeding concluded:

10905, any arrangements for continued rail service must be completed within 110 days. After the Commission decides to authorize abandonment, the finding is published in the Federal Register. Section 10905(c). Offers of financial assistance to subsidize or purchase must be made within 10 days of publication. *Id.* If the Commission concludes the offeror is financially responsible and the offer is adequate, issuance of a certificate of abandonment is postponed pending negotiations of the parties. Section 10905 (d). Either party may request that the Commission set the price and other terms of the sale or subsidy. Sections 10905(e), 10905(f)(1)(c). If such a request is made, the Commission must set the price and other terms within sixty days. Section 10905(f)(1)(A). The Commission's determination of value as a quasi-condemnation tribunal is binding on both parties, except that the offeror may withdraw its offer within ten days of the decision. Section 10905(f)(2). As the legislative history of the Staggers Rail Act illustrates, this abbreviated abandonment schedule was the result of the balancing of railroads' and shippers' interests by Congress.

> [W]e find that opportunity costs must be a factor used in determining whether the public convenience and necessity permits abandonment. This finding reflects our belief that opportunity costs are a real, and in some cases, very significant factor in determining whether the line at issue is imposing a burden on interstate commerce. . . . Such evidence may include the costs incurred in keeping assets tied up in less profitable uses elsewhere, including nonrail uses.
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> We believe that in the abandonment areas we must look ultimately to how productively assets are used. *Lines consisting of valuable assets may be better used elsewhere.* (Emphasis added).

See Missouri Pac. R.R. Co. v. United States and Interstate Commerce Commission, No. 79-1256 (8th Cir. March 17, 1980).

The Court of Appeals noted the abandonment provisions also demonstrate Congress' concern with the orderly operation of rail lines after their transfer under section 10905 (f). *Hayfield Northern, supra,* 693 F.2d at 822 (J.S. App. A-6 to A-7). A purchaser of a rail line under section 10905 may not transfer or discontinue service on the line for two years after the sale and may not transfer the line to anyone other than the transferor carrier for five years after the sale. Section 10905(f)(4).

A further congressional goal underlying the Staggers Rail Act was "to assist the railroads of the nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 3 (1980).[13]

Section 10905 of the Staggers Rail Act is comprehensive in its terms and coverage and is fashioned from a delicate balance of interests. It is clear from the legislative history of the Staggers Rail Act and its place in the development of the federal abandonment process[14] that Congress pro-

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[13]In State of Maine, Dep't. of Transp. v. Interstate Commerce Commission, 587 F.2d 541, 543-44 (1st Cir. 1978), the court considered the carrier's overall financial health as a factor to be weighed in determining whether rail service should be continued. The court stated that in weighing all the relevant factors in an abandonment, the Commission "could conclude that abandonment would bring about offsetting benefits to the financially pressed railroad, *including the ability to utilize the salvageable rails elsewhere on its line.*" *Id.* (Emphasis added). See also, *In re* Boston and Maine Corp., 596 F.2d 2 (1st Cir. 1979). Similarly, C&NW's marginal financial condition was considered by the Commission in the authorization of abandonment of the subject railroad line.

[14]In Chicago and North Western Transp. Co.—Abandonment Between Clintonville and Eland, Wis., 363 I.C.C. 975, 976 (1981), the Commission noted the extraordinary statutory scheme to preserve continued rail service.

vided section 10905 as the uniform federal method of acquiring rail lines for continued rail purposes following the administrative authorization of abandonment.

3. In affirming the District Court's order of summary judgment in favor of C&NW on the ground that Hayfield Northern's contemplated action was preempted by 49 U.S.C. §10905, the Court of Appeals properly applied the long established rule that a state law may not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of an act of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 102 S.Ct. 3014, 3022 (1982).

Article I, Section 8, Clause 3 of the United States Constitution provides "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . ." It has long been settled law that "there can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive." *Missouri Pac. R.R. Co. v. Stroud*, 267 U.S. 404, 409 (1925);

> In amending section 10905 (see section 402 of the Staggers Rail Act of 1980, Public Law 96-448), Congress established an entirely new procedure in abandonment proceedings. To ensure continued rail service where desired on lines authorized to be abandoned, Congress specifically conferred upon the Commission the power to force the abandoning rail carrier to sell the line or operate it under the subsidy . . . The statutory provisions set forth specific procedural time frames and substantive considerations to guide the Commission. Section 10905 evidences a clear congressional intent to ensure continued rail service through these extraordinary powers.

See also, Central of Georgia R.R. Co.—Abandonment, Docket No. AB-28 (Sub-No. 4) (December 17, 1982); Chicago and North Western Transp. Co.—Abandonment Between Norwood and Madison, Mn., Docket No. AB-1 (Sub-No. 142) (1983).

Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 (1981). The plenary power of the United States Congress over interstate commerce by virtue of Article I, Section 8, Clause 3 of the United States Constitution was recognized by this Court as early as 1824 in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The preemption doctrine derives from the Supremacy Clause of the United States Constitution (Art. VI, cl. 2), which states:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .. any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

A state law is "contrary" to a federal statute, and is thus preempted, if the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Perez v. Campbell*, 402 U.S. 637, 649 (1971), *quoting Hines v. Davidowitz, supra*, 312 U.S. at 67-68. The determination of a state "obstacle" is a two-step process of "first ascertaining the construction of the two statutes [federal and state] and then determining the constitutional question whether they are in conflict." *Perez v. Campbell, supra*, 402 U.S. at 644. In ascertaining whether any conflict between the federal and state statutes is present, a court's concern is necessarily with "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

If a federal statute reveals Congress' intent to foreclose all state legislation on the same subject, the state legisla-

tion will be deemed "contrary" to a federal statute, and thus preempted. *Fidelity Federal Savings & Loan Association, supra,* 102 S.Ct. at 3022. Congress' intent to "occupy the field" and thereby foreclose all state law on the same subject may be express, explicitly stated in the statute, or implied, implicitly contained in the statute's structure and purpose. *Id.*

Absent explicitly pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Id.* (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Without regard to whether Congress intended to foreclose all state legislation on the same subject, "a state statute is void to the extent that it actually conflicts with a valid statute. . ." *Edgar v. MITE Corp.*, 102 S.Ct. 2629, 2635 (1982). An actual conflict of federal and state statutes may be found either

> when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Fidelity Federal Savings & Loan Association, supra, 102 S.Ct. at 3022.

Minnesota state law, which would purport to authorize Hayfield Northern to condemn C&NW's abandoned railroad line for continued rail purposes, stands as such an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and is thus preempted by 49 U.S.C. §10905.

By enacting section 10905, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4110, 4157. This statute is carefully tailored to accomplish that purpose, and it makes provision for continued rail service an integral part of the federal abandonment process.

The elaborate procedural detail of this statutory scheme indicates that not only has Congress granted the Commission exclusive and plenary authority to regulate abandonments, *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., supra,* 450 U.S. at 320, Congress has also granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments. *Hayfield Northern, supra,* 693 F.2d at 822 (J.S. App. A-7).

To allow Hayfield Northern to use state condemnation proceedings to condemn C&NW's right of way and track for purposes of continued rail service would frustrate the accomplishment of Congress' purpose in enacting section 10905. *Hayfield Northern, supra,* 693 F.2d at 822 (J.S.

App. A-7). For example, the benefits of the 110-day time schedule would be lost, since the state proceedings, once commenced,[15] could take years. C&NW's removal of the subject track and appurtenances was continuously restrained from March 31, 1982 to February 9, 1983. The rail from the 19.2-mile segment of line, which C&NW had planned to utilize to fulfill its contracts with the State of Iowa and certain Iowa shippers to upgrade major grain hauling lines in Iowa, has remained intact for one year beyond the time of its anticipated removal in April, 1982. As a result of the instant litigation, the rail upgrading program has been disrupted, and C&NW has been prevented from utilizing the salvageable rail and track materials elsewhere on its system. Hayfield Northern's purported state condemnation action has subjected C&NW to the precise "protracted legal proceedings" which the procedures set forth in section 10905 were clearly designed to avoid. *Hayfield Northern, supra,* 693 F.2d at 823 (J.S. App. A-7).

4. To permit Hayfield Northern to invoke state condemnation procedures to acquire the 19.2-mile segment of line would circumvent the Commission's determination of value under 49 U.S.C. §10905(f). The Court of Appeals correctly concluded that there is no reason to allow the Shippers Group, acting through Hayfield Northern, to force C&NW to re-litigate the question of value in a state court when Congress has provided an expedited method by which sale price may be determined, especially when one determination of value has already been made. *Hayfield Northern, supra,* 693 F.2d at 823 (J.S. App. A-8).

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[15]Hayfield Northern has not yet filed its condemnation action, for reasons understood by neither Appellee nor the Court of Appeals. *Hayfield Northern, supra,* 693 F.2d at 823, n. 5 (J.S. App. A-7).

The Commission's jurisdiction under section 10905(f) was invoked by the incorporators and principals of Hayfield Northern. The Commission determined, in an unappealed order, that the net liquidation value of the 19.2-mile segment of line was in excess of $1.7 million. The attempt by Hayfield Northern to invoke state condemnation proceedings in an effort to obtain an independent determination of value of the 19.2-mile segment of the abandoned line, where Congress has given the Commission authority to determine value and where the Commission has in fact determined that value, is squarely an impermissible collateral attack on the Commission's decision of value.[10] It has long been held that courts will not consider collateral attacks upon Commission orders. *See Village of Mantorville v. Chicago Great Western Ry. Co.*, 8 F.Supp. 791

[10]Hayfield Northern's resort to Minnesota condemnation law in an effort to prevent C&NW's removal of the subject track, given the Commission's decision and order expressly permitting C&NW to remove the subject track and ties, also constitutes an impermissible collateral attack on the Commission's decision. The ALJ's initial decision and order (served July 15, 1981) included a provision for C&NW to keep its real estate, bridges, culverts and track intact for 120 days after the effective date of the decision in order for public acquisition to take place (pursuant to 49 U.S.C. §10906). C&NW thereafter petitioned the Commission for modification of the terms of the public use condition to exclude "track", since such was not properly included. In its decision and order served October 9, 1981, the Commission granted C&NW's petition to specifically "permit the removal of rail and ties." See Chicago and North Western Transp. Co.—Abandonment Between Oelwein, Ia. and Randolph, Mn., Docket No. AB-1 (Sub-No. 113F) (Certificate and Decision decided October 7, 1981, served October 9, 1981). The Commission's modification of the ALJ's decision to permit C&NW's removal of rail and ties was explicitly made a part of the Commission's order in connection with the abandonment proceedings. *Id.* This explicit Commission authorization and order permitting C&NW to remove its track was not appealed by the Shippers Group.

(D.Minn. 1934). *See also, Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., supra.*

The sole method for attacking a final order or determination of the Commission is by appeal to the appropriate federal court of appeals, pursuant to 28 U.S.C. §2321(a). *See Ex Parte 274 (Sub-No. 6), Abandonment of Railroad Lines and Discontinuance of Service* (49 C.F.R. Part 1121), 365 I.C.C. 249, 261 (1981).

Those who seek to avoid the federal requirements applicable to continued rail service when acquiring lines, as set forth in section 10905(f)(4), or who do not agree with the Commission's determination of value but who choose not to appeal such determination of value, cannot be allowed to proceed under the diverse jurisdictions of the 50 states of the United States where, as here, Congress has determined that continued rail service after the Commission's determination of abandonment is part and parcel of the federal abandonment process.

Hayfield Northern does not, in so many words, seek to annul or modify the Commission's orders, but rather bases its action on its purported power of eminent domain to acquire C&NW's track and real estate. However, the indisputable and ultimate effect of the state condemnation action is to require C&NW to re-litigate the question of value in a state court when Congress has provided an expedited method to determine sale price, and where the Commission has already determined the value of the subject property. Such a result clearly runs counter to the well-settled law in the District of Minnesota:

> The fact that such order of the Commission may run counter to a state statute, a municipal ordinance, or even a charter provision, is no impediment to the Commission's exclusive and plenary jurisdiction to

> regulate interstate commerce. The fact that the order is termed permissive and not mandatory does not give a state or a municipality the right to proceed in abrogation of the Commission's findings and order, and it is now uniformly recognized that, under the Transportation Act of 1920 (Interstate Commerce Act §1 (18-20), 49 USCA §1 (18-20)), the Interstate Commerce Commission has exclusive power to authorize the abandonment of all or a portion of a line of railroad used in interstate commerce.

Village of Mantorville v. Chicago, Great Western Ry. Co., supra, 8 F.Supp. at 794.

Hayfield Northern's contemplated condemnation action unmistakeably constitutes collateral attacks on the Commission's unappealed determination of value and order permitting removal of the subject track, and this Court should summarily affirm the judgment of the Court of Appeals.

5. The questions presented by this case do not justify further briefing and oral argument before this Court. The Court of Appeals' conclusion that Congress had granted the Commission exclusive and plenary authority to provide for rail continuation in connection with abandonments was a logical extension of this Court's decision in *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., supra,* which held the Commission had exclusive and plenary authority over abandonment of rail lines. Appellants' protestations to the contrary notwithstanding, the Court of Appeals' decision is not inconsistent with any decision of another federal court of appeals or this Court.[17]

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[17]Appellants incorrectly state that the Court of Appeals' decision conflicts with Chicago and North Western Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982), and Simmons v. Interstate Commerce

Appellants' attempt to buttress their argument by relying on nonauthoritative internal memoranda of the Commission concerning section 10905 is also misplaced. The position of the Commission was to not intervene in this case because the Commission's jurisdiction and responsibilities are not threatened or adversely affected by this litigation (J.S. App. L, A-30). The Commission's decision to not intervene in this case was appropriate, as the matter of statutory construction of the recently enacted Staggers Rail Act properly rests with the courts.[18] The District Court and the Court of Appeals have fully considered Appellants' proffered construction of the Staggers Rail Act and have correctly rejected the same.

Commission, 697 F.2d 326 (D.C. Cir. 1982). The Court of Appeals in the above-entitled action concluded that the dictum of the Seventh Circuit Court of Appeals in Chicago and North Western Transp. Co. v. United States, *supra*, "does not show that the Seventh Circuit, on full briefing and consideration, would hold that state condemnation laws are consistent with the purpose of [49 U.S.C.] §10905." *Hayfield Northern, supra*, 693 F.2d at 824 (J.S. App. A-11). Appellants' reliance upon *Simmons, supra*, is similarly misplaced. In *Simmons*, the Court of Appeals for the District of Columbia Circuit concluded only that the Interstate Commerce Commission had authority, under 49 U.S.C. §10505(a) (Supp. IV 1980), to exempt states from labor protection provisions of the Interstate Commerce Act. 697 F.2d at 328.

Appellants' contention that the Court of Appeals' decision conflicts with the Tenth Amendment and National League of Cities v. Usery, 426 U.S. 433 (1976), was not raised by Appellants in the District Court or on appeal from the District Court's decision to the Court of Appeals. Rather, this contention was raised for the first time in Appellants' Joint Petition for Rehearing and Joint Petition for Rehearing En Banc to the Court of Appeals. Appellee's reference to this contention is neither intended nor understood to constitute Appellee's acknowledgement or consent that this contention is properly before this Court.

[18]The General Counsel of the Commission recommended that the Commission not intervene in this action because "[t]he federal district court undoubtedly is aware of the doctrine of preemption and can reach the correct result without the Commission's participation" (J.S. App. N, A-47).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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